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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1623

FERRIS F. BOOTHE,

Petitioner,

v.

ROGERS C. B. MORTON, Secretary of the Interior, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FERRIS F. BOOTHE
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Portland, Oregon 97201
In Propria Persona-Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-73

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ROGERS C. B. MORTON, Secretary of the Interior, et al.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ferris F. Boothe prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 3, 1973, affirming the judgment of the United States District Court of Nevada, entered October 11, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Bronken* v. *Morton*, 473 F.2d 790 (C.A. 9th, 1973). The opinion of the District Court is reported as *Boothe* v. *Hickel et al*, 347 F. Supp. 1273 (D. Nev.,

1972). The opinion of the District Court in two companion cases (the *Hall-Bronken* cases) is reported as *Hall* v. *Hickel*, 305 F. Supp. 723 (D. Nev., 1969). These opinions are reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1973. Pursuant to extension of time, a Petition for Rehearing was timely filed on February 1, 1973. The Petition for Rehearing was denied on March 29, 1973, and the judgment of the Court of Appeals became final on that date. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Where petitioner has a vested contractual right against the United States to public land and it has been administratively acknowledged and judicially declared that "under existing law" the value of the land sought in response to said right may not be considered as a limitation in classifying land sought in response to said right, may administrative officials of the Department of the Interior thereafter impose maximum value limitations on that right which substantially destroy its value when

1) Congress has given a general grant of authority to establish minimum values only;

2) A pre-existing statute expressly provided that the defendants in exercising discretion in

classifying public land shall not in any way diminish, restrict or impair these rights under existing law, and

3) Where the Fifth Amendment to the Constitution provides that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation.

2. May and should this Court review administrative action taken by defendants (in a field generally committed to their discretion) denying plaintiff's application to classify public land for disposal in response to a vested contractual right to land when there was in existence, then unknown to petitioner, a non-public directive which was in effect for more than two years that no favorable action was to be taken on any such applications (Plaintiff's First Claim).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V

"No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES

43 U.S.C. § 274 (Statutory basis for Soldiers Additional Rights)

"Every person entitled under the provisions of Section 271 of this title to enter a homestead who may have, prior to June 22, 1874, entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres. R. S. § 2306."

43 U.S.C. § 315 (Taylor Grazing Act)

"Nothing in this chapter shall be construed in any way to diminish, restrict or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, ..."

43 U.S.C. § 315 f.

"The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved . . . which are . . . proper for acquisition in satisfaction of any outstanding . . . scrip rights . . . and to open such lands to selection or location for disposal in accordance with such classification under applicable public land laws . . . Provided, that upon the application of any applicant qualified to make entry, selection or location under the public land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select or locate such lands if opened to entry as herein provided." (emphasis supplied)

Act of August 31, 1964, 78 Stat. 751, Public Law

88-545, 88th Congress, H.R. 4149. (See Appendix A-1 to A-3 for entire text of statute).

"Sec. 3.(a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

(b) Holders of recorded claims may apply for reasonably compact areas of land so classified, and, upon his determination that the claim upon which an application is based is valid, the Secretary shall convey such lands to the applicant."

REGULATIONS

43 C.F.R. § 2612.1. Classification (Classification of Land under § 3 of the Act of August 31, 1964).

"(e) In satisfaction of applications filed on and after July 1, 1966, each claimant is entitled to receive land in tracts having a value per acre no less than the following:

(1) For soldiers' additional homesteads, claims, $250;

(f) Hereafter, no tract of land will be classified as suitable for disposition in satisfaction for claims if the value per acre of the tract exceeds the following:

(1) For soldiers' additional homestead, claims, $275;"

STATEMENT OF THE CASE

Petitioner is the owner of certain rights to public land known as Soldiers' Additional Rights, which are contractual rights created by the Congress of the United States, as a result of which, every soldier or sailor who served on behalf of the Union during the Civil War for 90 days or more and who was honorably discharged, and who had entered a homestead prior to June 22, 1874, of less than 160 acres was given the right to enter so much land as, when added to the quantity previously entered, should not exceed 160 acres. There was no requirement in the act that the land be homestead land or in any way relate to the original homestead except that the additional right of entry, plus the original homestead could not exceed 160 acres. Subsequent judicial decisions have established that the rights are freely inheritable and assignable.

No value limitations were placed on the rights by their original creation. The United States Supreme Court in *Webster* v. *Luther*, 163 U.S. 331, 341 (1896) held that Congress in creating these rights left the beneficiary free to select this additional land from any portion of the vast public domain described in the act and was free to apply it to any beneficial use that he chose. The opinion went on to state:

> "It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible."

After the act of August 5, 1955 (69 Stat. 534), which provided for the recordation of all such rights, Congress passed the Act of August 31, 1964 (78 Stat. 751) by which Congress required that these particular rights be presented, either for land or for money, by December 31, 1974, or they will be void. The act also directed respondents to establish minimum fair market values for these rights, provided that applications filed before July 1, 1966, would be classified by the respondents "under existing law" and that applications filed after July 1, 1966, would be limited to a selection from lands to be classified for scrip use to give the applicant "a reasonable choice of public lands against which to satisfy its claim." Public lands to be placed in this pool for selection were to have a value of not less than the average value of lands conveyed by patent for each type of scrip claim between August 1, 1955 and August 31, 1964. No authority was granted in the act to establish maximum value limitations. Nevertheless, by regulations enacted by respondents after July 1, 1966, respondents limited the value of any land to be granted in response to said applications to their own determination of minimum fair market value, plus 10%. By this action, they created a limitation based on their own estimation of the value of the land exchanged for scrip between August 1, 1955 and August 31, 1964, which limitation was to govern their actions for the next 10 years. This limitation ignored the factor of interest on the value of the asset, prevented the value of rights to the public land from rising with the value of otherwise available

public land and had the effect of imposing an artificial maximum limitation on the value of a previously unlimited contractual right. Congress had granted no authority to establish maximum value limitations.

Respondents claimed authority to take such action under the Taylor Grazing Act of 1935 which gave the Secretary of the Interior authority to examine and classify land proper for acquisition and satisfaction of outstanding scrip rights, as well as other types of claims. However, the act also provides that its provisions should not be construed in any way to diminish, restrict or impair any rights then existing. In 1934 and 1935, three executive orders "temporarily" withdrew all public domain land from entry, thus making this land subject to the classification authority granted by the act. These withdrawals are still in effect.

In the so-called Hall-Bronken cases, which were joined with the present case in the Opinion of the Court of Appeals, the applicants had made filings on land prior to July 1, 1966. The applications were rejected on the sole basis that the value of the land involved exceeded the maximum value standards established by the respondents. What the respondents did in fact was to issue a non-public directive that no favorable action was to be granted on scrip applications from June 24, 1964, until after regulations were prepared by respondents. Respondents then waited (for more than two years) until after July 1, 1966, promulgated their regulations limiting the value of land to be classified for scrip and then sought to apply

their new regulations to those pre-existing applications. Reversing the U. S. District Court, the Court of Appeals in the *Hall-Bronken* cases held that, as to these rights, "existing law" did not include value as a limitation and directed the respondents to issue patents to the land. These decisions are printed in the Appendix.

The Court of Appeals in the *Boothe* case affirmed the district court's decision involving petitioner's First Claim on the grounds that the applications were denied for reasons other than the value of the land applied for. The First Claim involved three applications utilizing approximately 200 acres of Soldiers' Additional Rights filed on July 22, 1965, for land lying west of Carson City, Nevada, which land the respondents refused to classify in response to said applications on the grounds that the lands were not economically reclaimable for agricultural use, were valuable for higher purposes than agriculture and, as to 47.5 acres thereof, that the same were valuable for retention in public ownership as "open space" reserve, whatever that means in Nevada, which is mostly open space. This was a purported exercise of administrative discretion. However, at the time the decision was made, and at that time unknown to the petitioner, there was in effect the non-public directive, dating from June 24, 1964, (which has already been mentioned) to all land offices that no favorable action was to be taken on any scrip or similar application. Petitioner contends that when discretion has been removed by secret administrative fiat, it is not an exercise of

administrative discretion to deny this application, particularly, on the specious grounds utilized.

The issues are somewhat different with regard to Petitioner's Second Claim. Petitioner used 124 acres of Soldiers' Additional Rights in an application filed after July 1, 1966, for land lying in the area of Las Vegas, Nevada, in a section located several miles to the west of the area involved in the *Hall-Bronken* litigation. Respondents refused to accept petitioner's application for these lands on the sole ground that the lands were of higher value than the value limitations they had imposed on Soldiers' Additional Rights, which was the sum of $250 per acre plus 10%, or a total of $275 per acre.

These same lands had previously been classified by respondents for conveyance out of federal ownership in exchange for scrip rights, although for rights for which they had authorized a higher minimum value. There is no administrative record of the refusal of the filing on these claims. The trial court, in determining cross-motions for summary judgment, required the petitioner to set forth the facts contended by him to be true and if the facts were not rebutted by respondents' affidavit, they were deemed to be true. It is admitted that the refusal to accept the application was on the sole ground that the value of the land exceeded the maximum value limitations on these rights by defendants.

It is also undisputed that land in the same section as the land in issue (Second Claim) and mixed in with

it (thus being virtually fungible with it) was sold by the federal government to private purchasers as small tracts between August 1, 1955 and August 31, 1964, at an average price of $88 per acre. Thus, virtually identical land was being sold for $88 per acre at the same time that the petitioner's Soldiers' Additional Rights were being given a minimum value of $250 per acre.

Petitioner contends that the maximum value standards imposed by respondents were imposed by respondents without the express authority of Congress and in derogation of the grant of authority contained in the act of August 31, 1964, and in direct violation of the directions of the Taylor Grazing Act not to impair, diminish or restrict any existing rights and that the substantial impairment of petitioner's contract right directly resulting from respondents' actions constitutes the taking of petitioner's property without due process of law.

There is also involved in this case the consideration of the circumstances under which the judicial branch of government may review actions by administrative officials when the agencies are acting in a discretionary capacity. Respondents have claimed that their actions are unreviewable. Petitioner contends that such action may be reviewed when it is arbitrary and unreasonable or is taken in the absence or or in derogation of Congressional authority or has the effect of taking away a substantial constitutional right of a private party, any of which grounds are sufficient for review and each of which are present in this case.

After the conclusion of administrative action, petitioner filed his complaint in the United States District Court in Reno, Nevada. Jurisdiction was founded upon the Act of October 5, 1962 (76 Stat. 744), 28 U.S.C. 1361, 1391, which authorizes actions to compel an officer of the United States to perform his official duty with respect to real property; the Act of June 25, 1948 (62 Stat. 930), 28 U.S.C. § 1331, as amended, with respect to matters in controversy arising under the Constitution and the laws of the United States; and under the Administrative Procedure Act of June 11, 1946 (60 Stat. 243), 5 U.S.C. 1009. After some preliminary motions concerning interrogatories, respondents filed motions for summary judgment on both claims (Tr. 72-91), tendered the administrative record with respect to the Second Claim and contended that there could be no judicial review of the administrative action taken by respondents. Petitioner filed cross-motions (Tr. 114-117) for summary judgment and pursuant to directions from the court, filed his affidavit (Tr. 144-180) in support of the motion, which affidavit also incorporated the provisions of a previous affidavit (Tr. 46-55). Judge Thompson ruled that all statements made in petitioner's affidavit would be deemed true unless rebutted by the respondents.

On October 15, 1969, Judge Thompson rendered his written Opinion and Judgment dismissing the complaint (Tr. 165-169). His Opinion refers and relies upon his decision (which was entered on the same day) in the *Hall-Bronken* cases. Both of his decisions

are printed with this petition. On January 3, 1973, the United States Court of Appeals for the Ninth Circuit reversed Judge Thompson in the *Hall-Bronken* case and affirmed his decision in the present case. The decision by the Court of Appeals did not consider the constitutional issues which had been raised by petitioner at the administrative levels and before the U. S. District Court. Petitioner then filed a Petition for Rehearing, which is also printed in the Appendix. On March 29, 1973, the Petition for Rehearing was denied, and the judgment of the Court of Appeals became final on that date.

REASONS FOR GRANTING THE WRIT

1. This case presents a basic constitutional question of great importance which was decided in a way in conflict with applicable decisions of this Court.

The question is whether or not a vested contract right may be abrogated by the substantial impairment of its value by the acts of administrative officials of the United States of America acting without statutory authority to effect such an abrogation.

As to these soldiers' additional rights, this Court held in *Webster* v. *Luther*, 163 U.S. 331, 341 (1896), that these particular rights were intended by Congress to have been made in the most advantageous form to the donee and no condition predecedent was set up to the entry by the beneficiary of the additional land based upon the additional right. The court held specifically that:

"The beneficiary was left free to select this

> additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible."

Thus, Congress established, and this Court confirmed, that these rights constituted a vested property right in the holders thereof. These were rights to public land of the United States which could not be defeated or substantially impaired without violating the Fifth Amendment to the Constitution of the United States.

In *Lynch* v. *United States*, 292 U.S. 571, 579 (1934), in a carefully reasoned decision by Justice Brandeis, a unanimous court held that an Act of Congress seeking to eliminate an existing insurance policy was void under the due process clause of the Fifth Amendment to the Constitution of the United States. The court held (p. 579):

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

The court went on to state (p. 580):

> "To abrogate contracts, in the attempt to lessen government expenditure, would be not the

> practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' Sinking Fund Cases, 99 US 700, 719."

Under the decision of the *Lynch* case, the United States has no more right than a private party to unilaterally impair or renege upon its contractual obligation to a private individual. As a practical matter, the United States may by official action through Congress avoid or impair its contractual obligations to a private party. Unless it consents to be sued, the concept of sovereign immunity protects the United States from liabilitw, but its action is still wrongful. The injured party, unfortunately, is left without a remedy.

However, with respect to these rights, the United States, acting through Congress, has expressly avoided any action which would restrict or impair their value. The Taylor Grazing Act, which first gave discretionary authority to the Secretary of the Interior, provided specifically, 43 U.S.C. § 315 that the act would not be construed:

> ". . . in any way diminish, restrict or impair any right which has heretofore, or may be hereafter initiated under existing law validly affecting the public land."

The act also contained mandatory language that upon any application of applicant qualified to make

entry, selection or location under the public land laws, the Secretary of the Interior shall cause any tract to be classified, 43 U.S.C. § 315f.

It is acknowledged that where the governmental entity has acted through the legislature (the authorized law-making branch of the government) the obligation of the contract clause with respect to a state has not been held to be absolute. That is, under certain circumstances, where the effect upon the obligee may be to affect the remedy and not to impair the right, there may be a "balancing" of the various policy interests, *City of El Paso* v. *Simmons*, 397 U.S. 497, reh. den. 380 U.S. 926 (1965). But, in this appeal, the legislature refused to act as defendants desired, the defendants went ahead anyway by administrative actions and no assertion of "balancing of rights" has been made.

This petition raises three significant constitutional issues, namely:

1) Reconciliation of the decisions of this Court in *Lynch* v. *United States*, involving the Federal government and the Fifth Amendment, and *El Paso* v. *Simmons*, involving the state government and the contract clause, each of which are supposed to have the same constitutional objective;

2) Whether a substantial impairment of the value of petitioner's rights constitutes a "taking" within the meaning of the Fifth Amendment, Cf., *U. S.* v. *Causby*, 328 U.S. 256 (1946), *Armstrong* v. *U. S.*, 364 U.S. 40, 48 (1960), and

3) Whether there is a valid constitutional distinction between such a taking when it is accomplished by the legislative branch of the government by statute as compared to a "taking" accomplished by administrative officials purporting to act under a general grant of authority from the legislature, but without express authority to do so and in derogation of pre-existing statutory language and the Fifth Amendment.

As part of its program to satisfy these rights, Congress passed the Act of August 31, 1964, which authorized the Secretary of the Interior to establish minimum fair market values for these rights, directed the Secretary to make a reasonable selection of land available to petitioner in satisfaction of his rights and established cash payment as an alternative to the use of the rights for land. The act did not purport to limit the value of the rights or to authorize the Secretary of the Interior or any of his subordinate officials to place maximum value limitations upon the value of these rights.

The defendants then proceeded to establish the "minimum fair market value" of these rights using what they concluded was the value of lands actually conveyed in response to scrip applications between August 5, 1955 and August 31, 1964, which minimum value was established at $250 per acre. Respondents then went on to enact regulations, now 43 C.F.R. § 2612.1 to 2612.5, which declared that no land would be classified for satisfaction of these rights if its value

exceeded $275 per acre (10% above the minimum fair market value as determined by the respondents). Respondents had a statutory obligation under section 3(a) of the Act of August 31, 1964, to classify:

> ". . . public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955."

At no time have respondents, the trial court or the appellate court answered the question as how a reasonable choice of land with which to satisfy these contractual obligations can possibly exist when the value is restricted by an arbitrary, unfair and static maximum limitation. "Reasonable" should mean reasonable not only in terms of location and character, but also, reasonable as to the most important aspect of the right; namely, the value of the land to be exchanged for these valuable contractual rights. Thus, there has been a "taking" of petitioner's property without due process of law by administrative action without express legislative authority.

2. This important question was wrongly decided below.

The Court of Appeals, in reversing the trial court and the previous administrative decisions in the *Bron-*

ken and *Hall* cases, could see the wrongful nature of the defendants' conduct. In those cases, there were pre-existing applications (filed before June 30, 1966) which under the express language of the Act of August 31, 1964, were to be processed to a conclusion under "existing law" under which the value of the land was not a factor. The respondents simply did nothing for two years while the non-public moratorium was in effect and then denied the applications under a new set of regulations purporting to follow their authority for applications filed after July 1, 1966. In effect, the respondents simply changed "the rules of the game" in direct contradiction to express statutory directions and the appellate court held their conduct to be wrongful.

In the present appeal, the constitutional vice of respondents' conduct is the same. The respondents unilaterally abrogated the value of petitioner's contract rights. But because they did it in the form of official regulations and did not violate any explicit provisions of the Act of August 31, 1964, the Court of Appeals could not see through the gloss of administrative overlay to realize that the result was still a denial of due process of law and the taking of a valuable property right without compensation.

In the Petitioner's Second Claim, the *only* basis for refusal to accept the filings was the fact that the value of the land exceeded the maximum value (or $275 per acre — 10% over the minimum) placed upon the contract rights by respondents in their regu-

lations. The land was classified for disposal by the federal government. There were no other competing claims to the land, no reason to hold it in federal ownership.

With regard to the specific land in issue, the unconstitutionality ("the taking") is demonstrated by the fact that land immediately adjacent and mixed in with the land which is the subject of Petitioner's Second Claim was sold as small tracts for an average value of $88 per acre between 1955 and 1964 (the same period used as the measuring period by respondents in determining minimum fair market values of these rights). It has been thoroughly established that Petitioner's right was and is a vested contract right to unappropriated public domain land of the United States. There is discretion in respondents but this is a discretion to weigh some other need for a particular tract of land against the rights of the claimant; not to work a destruction of the value of those rights.

If Congress had intended to work such an abrogation, it could have done so by imposing maximum value standards. That would have been a breach of contract and an abrogation of Petitioner's rights but the doctrine of sovereign immunity would probably have barred Petitioner from judicial recourse. But Congress did not do this. Clearly, rights to land should be free to rise with the increase in the value of the land. Respondents on their own without the express authority of Congress (and, indeed, against its rejection of their proposal to change the law and in derogation of the

protective language of the Taylor Grazing Act) went ahead with official regulations to accomplish administratively what Congress had refused to enact legislatively.

The result is confiscation of Petitioner's contract rights against the United States. The unilateral removal of the value of a contract right is a breach of contract and a "taking" of property in the constitutional sense (reducing the value of a contract right by 80% should be no different legally or constitutionally than reducing the right by 100%). No reasonable choice of lands can be made for application by holders of these rights if the fundamental aspect of the contract right (the value of the lands which may be obtained with it) is artificially and unreasonably circumscribed.

The trial court and the appellate court failed to apply the holdings of this Court in *Lynch* v. *United States*, 292 U.S. 571 (1934). Even if this Court should hold that a contract right against the United States is not an absolute, there is no justification here for a "balancing away" of a contractual right. There is no compelling federal or other public interest which would justify the respondents' actions in establishing the maximum value limitations. The fact that in their view the contract might be a "bad bargain" for the United States is not such a justification. The respondents retain a large measure of discretion in balancing any competing public and private interests but discretion is not license to take property without due process of law.

The Court of Appeals also upheld the respondents' actions as to Petitioner's First Claim. This involves the further question as to whether discretionary administrative action which appears to be valid on its face can be reviewed when the "bona fides" of such action are vitiated by other facts. This classification action by respondents took place when, unknown to petitioner, a non-public directive had been issued to all land offices to take no favorable action on any scrip applications for land. The purpose was to gain time for respondents to attempt to get Congress to change the provisions of August 31, 1964 (which was unsuccessful), and to cut off applications which they might otherwise have to include in their value standards. But it also means that a denial of Petitioner's First Claim for obviously specious reasons should be subject to judicial scrutiny. It is not administrative discretion when a result has been foreordained by a directive from headquarters regardless of the merits of the claim which is supposed to be the subject of the administrative discretion. This type of conduct in the administrative field has never been sanctioned by this Court.

The "reasons" set forth in the administrative decision represent merely an exercise in semantics to put a gloss of administrative respectability upon a decision which was foreordained to be negative. Petitioner contends that such action is arbitrary and unreasonable and may and should be reviewed by the judicial branch of the government.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Public Law 88-545
88th Congress, H. R. 4149
August 31, 1964

AN ACT

78 STAT. 751.

To provide for the satisfaction of claims arising out of scrip, lieu selection, and similar rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, except for military bounty land warrants, all claims and holdings recorded under the Act of August 5, 1955 (69 Stat. 534, 535), which are not satisfied in one of the ways hereafter set forth, shall become null and void on the later of the two following dates: (a) January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975; (b) at the termination of any transaction initiated pursuant to this Act.

SEC. 2. Prior to July 1, 1966, holders of claims recorded under the Act of August 5, 1955, may apply to the Secretary of the Interior to have conveyed to them, in satisfaction of their claims, such lands as they may, in their applications, designate. The Secretary shall thereafter convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid. As used in this Act, the terms "lands" and "land" include any rights or interests therein.

SEC. 3. (a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for

each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

(b) Holders of recorded claims may apply for reasonably compact areas of land so classified, and, upon his determination that the claim upon which an application is based is valid, the Secretary shall convey such lands to the applicant.

SEC. 4. Prior to January 1, 1968, the Secretary shall, by registered mail or certified mail sent to the address of record of each person having an unsatisfied claim, offer in satisfaction of such claim lands of a value of not less than the average fair market value of those public lands actually conveyed in exchange for each type of claim since August 5, 1955. Fair market value shall be determined in the manner prescribed in section 3 of this Act. Upon acceptance of the offer, the Secretary shall convey the lands to the claimant, if he determines that the claim is valid.

SEC. 5. In respect of any type of claim recorded under the Act of August 5, 1955, not more than three conveyances of public lands in exchange for which have taken place since that date, the Secretary shall determine the type of claim which it most clearly resembles, and at least four conveyances in exchange for which has taken place August 5, 1955, and shall, for the purposes of this Act, treat it in all respects as if it were such type of claim.

SEC. 6. Prior to January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975, any person who has a claim recorded pursuant to the Act of August 5, 1955, by written notice to the Secretary of the Interior, or any officer of the Department of the Interior to whom authority to receive such notice may be delegated, may elect to receive cash instead of public land in satisfaction of his claim, at a rate per acre equal to the average value of the lands offered by the Secretary under section 4 of this Act. Upon a determination that the claim is valid, the Secretary or his delegate shall certify the claim to the Secretary of the Treasury who is authorized and directed to pay the claim out of any money in the Treasury not otherwise appropriated. Acceptance of the money shall constitute a full and complete satisfaction of the claim or holding for which the money is paid: *Provided,* That no agent or attorney acting on behalf of another to procure a payment under this Act shall demand, accept, or receive more than 10 per centum of the payment made, and any agreement to the contrary shall be null and void.

Approved August 31, 1964.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 1248 (Comm. on Interior & Insular Affairs).

SENATE REPORT No. 1455 (Comm. on Interior & Insular Affairs).

Apr. 6: Considered and passed House.

Aug. 18: Considered and passed Senate.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERRIS F. BOOTHE, Appellant,	)	
v.	)	No. 25,284
ROGERS C. B. MORTON, Secretary of the Interior, et al., Appellees.	)	D.C. #Civ R-2048

Before: KOELSCH and CHOY, Circuit Judges, and POWELL, District Judge.

On Petition for Rehearing

Appellant's Petition for Rehearing is denied.
Filed and entered March 9, 1973

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 25284

FERRIS F. BOOTHE,

Appellant,

vs.

ROGERS C. B. MORTON, Secretary of the Interior, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

APPELLANT'S PETITION FOR REHEARING

COMES NOW Ferris F. Boothe, Appellant above-named, and pursuant to Rule 40, FRAP, petitions the Court for rehearing of its decision and judgment rendered herein on January 3, 1973, in the above appeal.

Appellant respectfully contends that this Honorable Court in its decision overlooked, or at least did not discuss, the primary point of constitutional and administrative law that

the defendants, acting without adequate authority from Congress, deprived plaintiff of his property rights without due process of law in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. Plaintiff was and is the owner of rights to land which, under the laws of the United States, were unrestricted as to value. The Congress of the United States, in the Act of August 31, 1964, directed defendants to establish minimum fair market values and to make a "reasonable selection of lands" available to plaintiff. Congress did not authorize (and in fact rejected the request of defendants' predecessors in office) defendants or their predecessors in office to arbitrarily establish a value limitation of 10% over said minimum fair market values as a maximum on the value of the lands to be offered to plaintiff. Said action was done without Congressional authority and has resulted in a taking of plaintiff's property without due process of law by reducing its value by establishing an arbitrary, unreasonable and static value limitation. The Court in its opinion, dated January 3, 1973, did not consider or pass upon this basic constitutional right asserted by plaintiff.

Defendants acted arbitrarily and unreasonably in refusing to permit plaintiff to file an application as set forth in his Second Claim for land which was classified for disposal in response to scrip applications. The sole and only ground for refusal was that the value of said lands exceeded the value

limitations which defendants had unlawfully and arbitrarily established for plaintiff's vested contract rights to land. Further, as to plaintiff's First Claim, the Court did not pass upon appellant's contention that the classification decision was made arbitrarily and in bad faith, and in reality, was based upon the nonpublic directive from the Bureau of Land Management directing all field offices to issue no favorable classification on scrip. No discretion could be exercised by these offices on considering applications of land and making classifications based thereon. Thus, the defendants' decision was ipso facto unreasonable and arbitrary since the only directions during this period from defendants were that subordinate officers were to find reasons to reject applications and not to consider them on their merits. The plaintiff's factual allegations regarding these matters were not denied by defendants and, in fact, were recognized by this court in its decisions in the Hall and Bronken cases, which were included in the court's decision in the Boothe case. These decisions should be judicially reviewed.

ARGUMENT

It was established by Lynch vs. United States, 292 US 571, 54 S.Ct. 840, 78 L.Ed. 1435 (1934), that a contract creates a vested right and that the United States is as much bound by its contract as is an individual. Soldier's Additional Rights were

specifically declared by the United States Supreme Court in Webster vs. Luther, 163 US 331, 16 S.Ct. 963, 41 L.Ed. 179, 182 (1896), to be a binding contractual right against the United States.

It has been admitted by the defendants and was held by this Court in its decision, dated January 3, 1973, in the Hall and Bronken cases, which were decided at the same time as the present appeal, that there were no value limitations under existing law as to these rights; and, in fact, there could not be. The acts of Congress which created these rights established no value limitations. The United States Supreme Court in Webster v. Luther, supra, at page 182, declared that the presumption was that Congress intended to make these rights as valuable as possible.

The Taylor Grazing Act which first gave discretionary authority to the Secretary of Interior provided specifically, 43 USC § 315, that the Act would not be construed

> "in any way to diminish, restrict or impair any right which has heretofore, or may be hereafter initiated under existing law validly affecting the public land."

The Act also contained mandatory language that upon any application of applicant qualified to make entry selection or location under the Public Land Laws, the Secretary of the Interior shall cause any tract to be classified, and the holder of the right should have a preference right, 43 USC § 315(f). Under the decision of the Lynch case, supra, the United States has

no more right than a private party to unilaterally impair or renege upon its contractual obligation to a private individual. As a practical matter, by reason of its sovereign immunity, the United States may by appropriate and official action through Congress avoid or impair its contractual obligation to a private party. Unless it consents to be sued, the concept of sovereign immunity protects the United States from liability, but the action is still wrongful. The injured party is merely left without a remedy.

However, with respect to these rights, the United States, acting through Congress, has expressly avoided any action which would restrict or impair their value. As previously stated, the Taylor Grazing Act contained specific language stating that it would not be construed to impair vested rights. The Act of August 31, 1964, established only minimum fair market values and established cash payment as an alternative to the use of the rights for land. The Act does not in any respects purport to limit the value of these rights, nor to authorize the Secretary of the Interior or any of his subordinate officers to place limitations upon the value of these rights.

Under Section 3(a) of the Act, the Secretary was directed to classify sufficient lands

> "so as to provide each holder of such a claim with a <u>reasonable</u> choice of public lands against which to satisfy his claim." (Emphasis supplied.)

This Court did not answer the question as to how a reasonable choice of public lands with which to satisfy a contractual claim can possibly exist when their value is restricted by an arbitrary, unfair and static maximum limitation. The term "reasonable" should mean not only reasonable in terms of location and character, but, also, reasonable as to the most important element: namely, the value of the land which is to be exchanged for these valuable contractual rights against the United States, which rights had previously been declared to be without value limitations and concerning which, Congress had declared should not be diminished by the Secretary of the Interior in carrying out the Taylor Grazing Act. To characterize such value limitations as "reasonable" is a contradiction in terms.

Once this Court has confirmed (as it has in the Hall and Bronken cases) that under the existing law there was no limitation on the value of these rights, the Act of August 31, 1964, does not change this existing law. The Act of August 31, 1964, as to rights which had not yet been applied for land, merely provided that a reasonable selection of lands would be made available, and that, as an alternative, holders of rights could turn them in for cash at a price determined in the manner provided. When read in conjunction with the provisions of the Taylor Grazing Act previously cited, no legislative change has been attempted with regard to the value of rights as they may

be applied to land. It is not a reasonable selection of lands when the land is limited to land of $275.00 per acre or less.

Impairment of a contract is ipso facto unreasonable. The arbitrary establishment of maximum value limitations by the defendants without the express and explicit authority of the United States acting through the Congress is an improper and arbitrary act taken without statutory authority and violative of the constitutional rights of Boothe.

The term "reasonable choice of public lands" applies to the scope and variety of the lands to be offered. It is an unreasonable and improper interpretation to read into this language any authority for the defendants to place an arbitrary ceiling on the value of these rights when Congress has not only not granted any such authority but, expressly, as this Court found, rejected a request from the defendants for such authority and a change in the provisions of the Act of August 31, 1964. The undisputed facts show that the defendants refused even to accept the application submitted by Boothe for the lands in question on the sole ground that the value of the lands exceeded the maximum values established by the defendants.

This was true even though the defendants' predecessors in office had conceded that there were no limitations provided by law on the value of these rights (Tr. 68). All of the land for which plaintiff sought to make application had been classified as suitable for disposal in response to scrip applications.

Thus, there was no competing federal interest or any other public interest concerning which the defendants had any measure of discretion. Likewise, not only had defendants for many years completely ignored the so-called "agricultural limitation" in considering applications for land, particularly in Alaska, but the lands in the Las Vegas area specifically classified for application by holders of Soldier's Additional Rights were located 10-20 miles out on the desert and had no agricultural capability whatsoever (Tr. 159).

The unreasonableness of the defendants' position in rejecting the application is further demonstrated by a study (Tr. 156-159) made of land in the same section involving tracts mixed in with the lands for which the plaintiff sought to file application for classification. Between 1956 and 1964, which is the same "measuring" period used by the defendants to determine the minimum fair market value of Soldier's Additional Rights (which was established at $250.00 per acre), 260 acres in this same section were sold by defendants as small tracts for an average price of $88.00 per acre. The evidence is undisputed. Contract rights to land should be free to rise with the value of the land.

This principle is not changed by the cash purchase provisions of the Act of August 31, 1964, because those provisions were established only as an alternative means by which the holders of these rights may satisfy them. The so-called

"minimum fair market values" can only be regarded as minimums for the reason that the standards of value by which they were determined were out of date long before the determination was completed since they involved the period of 1956-1964, and are now completely inadequate as a measure of values 10-15 years later. If, as Congress directed, these values are treated as "minimum fair market values" only, the requirement is not unreasonable. On the other hand, when the defendants, without specific Congressional authority, and in the face of Congressional rejection of such authority, seek to establish an inflexible maximum limitation just 10% above these minimum values, then the result is completely unreasonable and a violation of the constitutional rights of the holders of these rights.

When the public lands made available to the holders of these rights are so limited it is logically impossible to regard these as "a reasonable choice of public lands" because the unfairness of the stationary and static maximum value fails to take into account either the factor of interest on the contractual obligee's investment or the usual and normal appreciation of land values to which these rights are directly tied by law.

The heart of any contractual right is the value of that right. When the value of that right is unreasonably and unfairly limited, the value of that "vested right" is substantially

impaired and the result is a violation of the constitutional rights of the owner as the same are protected by the Fifth Amendment to the Constitution of the United States. Congress did not purport to take such action in the Act of August 31, 1964. When we read the provisions of the Act of August 31, 1964, in pari materia with the language of the Taylor Grazing Act to protect vested rights, it is quite clear that the defendants acted without statutory authority. When defendants act without statutory authority, and, particularly, in violation of constitutional rights, their actions are improper and are properly reviewable by the court.

Thus, the petitioner respectfully contends that this Court in its Opinion and Judgment, dated January 3, 1973, did not take into consideration nor discuss the absence of statutory authority for the defendants' attempt to establish maximum values for these rights; nor did the Court discuss the due process clause as set forth in the Fifth Amendment of Constitution of the United States as the same applies to these circumstances. The Court did not consider and discuss the basic premise that these are vested contractual rights against the United States, that the value of any right is obviously essential to it, and that the unilateral impairment of value by one party to a contract constitutes a violation of contract. The United States should not be put in a position of breaching a contract unless by the clearest expression of such intent and direction by the

Congress of the United States. This did not occur. In fact, the Taylor Grazing Act expressly protected these rights and provided an injunction against the defendants impairing or diminishing the rights. Thus, the defendants have acted in violation of the express directions of Congress. The Court did not meet this basic constitutional issue in its decision of January 3, 1973, and for that primary reason, rehearing is sought.

Upon such rehearing, the undersigned respectfully suggests that the decision of the Court regarding the Second Claim be modified to reverse the holding of the Federal District Court and to direct the defendants to accept the application of Boothe for the lands set forth in his application, each acre of which land had been previously classified for disposal. The First Claim should be remanded to the District Court for hearing on the issues regarding the arbitrariness and bad faith of the defendants in purporting to exercise discretion in their decision when, in fact, nonpublic directives from the Bureau of Land Management had directed that all applications be rejected. The absence of discretion, represented by such explicit directions negates the exercise of any discretion. Such conduct is reviewable by the courts.

Respectfully submitted,

Ferris F. Boothe
Appellant and Petitioner
3100 First National Bank Tower
Portland, Oregon

In Propria Persona

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERRIS F. BOOTHE, Plaintiff-Appellant,	)	
v.	)	
ROGERS C. B. MORTON, Secretary of the Interior, et al., Appellees.	)	No. 25,284

APPEAL from the United States District Court for the ..... District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 3, 1973.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL B. BRONKEN, *Plaintiff-Appellant,* vs. ROGERS C. B. MORTON, Secretary of the Interior, *Defendant-Appellee.*	No. 25,282
DESSIE M. HALL & FIRST NATIONAL BANK OF NEVADA, *Plaintiffs-Appellants,* vs. ROGERS C. B. MORTON, Secretary of the Interior, *Defendant-Appellant.*	No. 25,283
FERRIS F. BOOTHE, *Plaintiff-Appellant,* vs. ROGERS C. B. MORTON, Secretary of the Interior; BOYD RASMUSSEN; NOLAN F. KEIL; and ROLLA E. CHANDLER, *Defendants-Appellees.*	No. 25,284

[January 3, 1973]

Appeal from the United States District Court for the District of Nevada

Before: KOELSCH and CHOY, Circuit Judges, and POWELL,* District Judge.

KOELSCH, Circuit Judge:

These three cases are here on the plaintiffs' appeals from summary judgments dismissing their actions to review administrative

*Honorable Charles L. Powell, United States District Judge, Spokane, Washington, sitting by designation.

decisions of the Secretary of the Interior refusing to issue patents to public lands pursuant to applications filed by plaintiffs as holders of land selection rights.[1]

From time to time, especially during the Nineteenth Century, Congress has seen fit to bestow upon persons performing services for the government, or upon other persons deemed worthy, rights to receive lands from the public domain. To that end, provisions have been made for the issuance of "scrip" or other evidence of such rights, which would entitle the holders to land patents upon presentation of the rights to the Secretary of the Interior or his designates.[2] In the early days of scrip, the land selection process was quite simple. A scrip holder merely presented his rights and designated any unreserved lands he wished to acquire. However, a series of executive orders withdrew from selection or reserved virtually all public lands.[3] And the Taylor Grazing Act of 1934 was enacted. Under Section 7 of that Act (43 U.S.C. §315f), the Secretary of the Interior was authorized, in his discretion, to "examine and classify any [public] lands withdrawn or reserved by [executive orders] . . . which are more valuable for the production of agricultural crops than for the production of native

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[1]The applications of Bronken and Hall (Nos. 25,282 and 25,283) were based upon Valentine Special Certificates, scrip rights created by the Act of April 5, 1872 (17 Stat. 649), to compensate one Valentine, successor to a Mexican land grant, for the loss of some 13,000 acres to settlers claiming title derived from the United States. The Act gave the claimant the right to select ". . . an equal quantity of the unoccupied and the unappropriated public lands of the United States, not mineral . . . ."

Boothe's applications were based upon Soldiers' Additional Homestead Rights, created by the Act of June 8, 1872. That act, as amended, appears in 43 U.S.C. §274, and will be discussed in Part II of this opinion.

[2]See, e.g., Act of April 5, 1872, 17 Stat. 649 (Valentine scrip); Act of July 17, 1854, 10 Stat. 304 (Sioux Half-Breed scrip); Acts of June 22, 1860, 12 Stat. 85, March 2, 1867, 14 Stat. 544, and June 10, 1872 (Supreme Court scrip); Act of June 2, 1858, 11 Stat. 294 (Surveyor-General scrip); Act of February 10, 1855, 10 Stat. 849 (Girard Special Certificates); Act of April 11, 1860, 12 Stat. 836 (Porterfield warrants); Treaty of March 17, 1842, 11 Stat. 581 (Wyandotte scrip); Act of March 3, 1905, 33 Stat. 1264 (forest lieu selection rights).

[3]Executive Orders, No. 6910 (1934); No. 6964 (1935) and No. 7048 (1935).

grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for the acquisition in satisfaction of any outstanding lien(sic), exchange or script(sic) rights or land grant, and to open such lands for entry, selection, or location for disposal under applicable public land laws • • •."

After the Taylor Grazing Act, scrip holders were required, before they could redeem their rights, to apply to the Secretary to have the lands they wished to enter "classified" for scrip redemption purposes. Thus, the Secretary, by exercising his classification authority, could prevent the transfer to scrip holders or other claimants of lands which he deemed should be retained in federal ownership or used for some other public purpose, thereby effectuating the "national policy of conservation of the rapidly diminishing public domain and its natural resources." See *Carl v. Udall*, 309 F.2d 653, 657-658 (D.C. Cir. 1962).

However, neither executive withdrawal nor the Taylor Grazing Act directly affected land selection rights, except to the extent the Secretary's classification authority limited their exercise. Most of these rights were of unlimited duration and, apparently, no accurate record had ever been maintained as to the amount of script which had been redeemed or which remained outstanding as inchoate claims on the public domain. To resolve this problem, Congress passed the Act of August 5, 1955 (69 Stat. 534), which provided in substance that all holders of scrip and similar selection rights were obliged to record their claims with the Department of the Interior within two years, and that claims not so recorded would not thereafter be honored. Then, on August 31, 1964, Congress placed a time limitation upon the validity of all the scrip claims recorded under the 1955 Act. By the 1964 Act (78 Stat. 751), Congress required all valid claims to be presented, either for land or for money, by January 1, 1970, or January 1, 1975, depending upon the type of claim; failure to present the claims in one of the methods provided by the Act would render the claims "null and void."

In addition, the 1964 Act, in terms, distinguished between scrip applications filed before July 1, 1966, and those filed thereafter. Thus, with respect to those applications filed before July 1, 1966, Section 2 of the Act permitted the applicant to designate lands

of his own selection, and directed that the Secretary's classification decision was to be made "under existing law."[4] However, with respect to applications made after July 1, 1966, the terms of Section 3 provided, in effect, that the applicant no longer enjoyed an option to select such lands as he desired, but was limited to making a selection from a reservoir of public lands which the Secretary was to classify and set aside for conveyance and exchange for these applications.[5] To protect the rights of these latter applicants, Congress provided that the public lands to be placed in this reservoir, or pool, for selection, have a value of not less than the average value of lands conveyed by patent for each type of scrip claim since the passage of the 1955 Act.

In August of 1966, the Secretary promulgated a regulation [43 C.F.R. §2221.07 (1967)], under which he established guidelines to implement the land classification provisions of the 1964 Act. The regulation provided that, when lands are classified to form the selection pool pursuant to Section 3 of the 1964 Act, only those lands having certain values will be available for each type of scrip claim. The minimum values were set, in accordance with the provisions of the Act, at the average value of lands conveyed for each type of claim since August 1955. 43 C.F.R.

[4]Section 2 provides:

"Prior to July 1, 1966, holders of claims recorded under the [1955 Act] may apply to the Secretary of the Interior to have conveyed to them, in satisfaction of their claims, such lands as they may, in their applications, designate. The Secretary shall thereafter convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid."

[5]Section 3 provides:

"(a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the [1955 Act], public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

(b) Holders of recorded claims may apply for reasonably compact areas of land so classified and, upon his determination that the claim upon which an application is based is valid, the Secretary shall convey such lands to the applicant."

§2221.07(e). The regulation also provided, however, that "no tract of land will be classified as suitable for disposition in satisfaction for claims" if the value per acre of the lands was more than ten percent greater than these minimum value figures. 43 C.F.R. §2221.07(f) (1967). Thus, the Secretary not only set a floor but, in addition, fixed a ceiling on the value of lands eligible for selection.

These cases involve several aspects of the Secretary's powers in handling applications for public lands under the 1964 Act. The Bronken and Hall appeals bring into question the Secretary's power to apply the value limitation of 43 C.F.R. §2221.07(f) to lands applied for prior to July 1, 1966. Boothe's appeal questions the authority of the Secretary to impose land use criteria to pre-1966 applications, and the validity of his regulation establishing maximum values for lands to be classified for conveyance pursuant to Section 3 of the 1964 Act.

I. THE BRONKEN-HALL APPEALS.

Bronken and Hall, as holders of Valentine scrip, filed application for public lands located near Las Vegas, Nevada, in April and June of 1964, and in February of 1965. Since the applications were filed prior to July 1, 1966, the Secretary was obliged, by Section 2 of the 1964 Act, to treat the applications under "existing law." The Secretary took no action on the applications until early 1967, at which time he rejected the applications for the following reason:

> "Based upon analysis of sales of similar land located nearby, the estimate of value of the parcel[s] far exceeds the maximum value established by regulation [43 C.F.R. 2221.07 (f)] for land to be classified for disposal in satisfaction of Valentine Scrip • • •."

In the District Court, Bronken and Hall asserted that the Secretary's application of the regulation was contrary to the provisions of Section 2 of the 1964 Act. The court, however, did not reach this question, being of the opinion that the Secretary had acted within his discretion under the public land laws and that, therefore, judicial review was precluded by Section 10 of the Administrative Procedure Act. 5 U.S.C. §701. *Hall v. Hickel*, 305 F.Supp. 723 (D.Nev. 1969). We reverse.

"We recognize the intrinsic difficulty in determining whether a discretionary action of an agency is reviewable. Almost every agency action involves some degree of discretion of judgment. Yet it cannot be said that, for this reason, every agency action is unreviewable. The analytical problem is that of determining when the agency action is 'committed to agency discretion' within the meaning of Section 10 of the Administrative Procedure Act, and when it merely 'involves' discretion which is nevertheless reviewable." *Ferry v. Udall*, 336 F.2d 706, 711 (9th Cir. 1964), *cert. denied*, 381 U.S. 904. While it is true, as the District Court observed, that the Secretary's discretion in classifying public lands is quite broad, it is equally true that this discretion is not absolute. His decisions are beyond judicial scrutiny only when he possesses discretion, and he acts within the limits Congress has placed on this discretion.

In our view, Section 2 of the 1964 Act imposed a crucial limitation upon the Secretary's discretion in handling land scrip applications. That section provides that, upon an application filed prior to July 1, 1966, the Secretary "shall thereafter convey" the lands selected by the scrip applicant, so long as the land may be classified for such conveyance "under existing law." The clear meaning of this provision is that the Secretary was required to apply only those criteria to a Section 2 application which he historically applied prior to the passage of the 1964 Act. We are clear that monetary value of the selected lands was not one of those criteria. In recommending enactment of the 1964 Act, the Assistant Secretary wrote the Congress that "Under existing law, scrip holders may acquire any unreserved public lands to the extent that the acreage of the scrip permits. Such selections require favorable consideration under Section 7 of the Taylor Grazing Act, 43 U.S.C. §315f." H. Rep. No. 1248, 88th Cong. 2d Sess. (1964), at 4-5. Congress placed no value limitation on the lands which might be selected under Section 2. Notwithstanding the clear provisions of Section 2 and the state of existing law at the time of the Act's passage, the Secretary refused to process applications for land he deemed too expensive.[6] Instead, Department officials attempted to obtain an amendment to the

[6]As indicated earlier, two of the three applications involved in the Bronken-Hall appeal were filed even prior to the enactment of the 1964 Act, and the remaining application was filed shortly after its enactment.

Act which by its terms would impose maximum dollar values on all lands available to scrip holders.[7] The amendment died in committee, and it is apparent from hearings on the amendment, held in both the Senate and House committees, that in 1965 neither the committee members nor the Secretary were of the opinion that Section 2 authorized placing value limits on lands available for selection by scrip holders.[8] Moreover, the Secretary's treatment of these scrip applications is completely at variance with assurances given the committee members by the Assistant Secretary that scrip applications filed before July 1966, would be handled without reference to the value of the lands selected by the applicants.[9]

In view of the legislative history of the 1964 Act, and of the proposed amendment to that Act, we think it clear that the Secretary was without authority to impose value limits upon Section 2, applicant-selected, lands. He had no authority to place such limits on lands under the law as it existed in 1964, and the Act did not grant him any additional authority to do so.[10] Conse-

[7]S.2321, H.R. 10,193, 89th Cong.

[8]See, Hearings on S.2321, before the Senate Subcommittee on Public Lands, Comm. on Interior and Insular Affairs, 89th Cong. 1st Sess. (Aug. 19, 1965), at 8; Hearings on H.R. 10.193, before the House Subcommittee on Public Lands, Comm. on Interior and Insular Affairs, 89th Cong. (Aug. 20, 1965, and Feb. 10, 1966), at 9-10.

[9]In the House hearings, Mr. Carver, the Assistant Secretary, assured the subcommittee chairman that he would end his "moratorium" on pending applications, and that, "Everybody else will be handled in the manner which I told the committee today; namely, they can apply without limitation of value before 1966." House Hearings, supra note 8, at 105.

[10]The Department files on the Hall application show that in 1964, shortly before the Act was passed, the Secretary issued patent to other lands in the Las Vegas area having a value approximately equal to the value of the lands involved in the Bronken and Hall applications. During the Hall administrative protest proceeding, this fact was admitted and brushed aside with the statement that "The classification and disposal [of those other parcels] was in accordance with regulations then in effect." What this meant was that there was nothing in the regulations at that time prohibiting classification of applicant-selected lands on the basis of monetary value alone. The Department's position in the Bronken-Hall matters has been, in effect, that by sitting on these applications until after the promulgation of the 1966 regulations, it could apply the standards embodied in those regulations to applications filed under Section 2 of the Act. This is simply contrary to the express provisions of

quently, the Secretary's denial of the Bronken and Hall applications, solely by reason of their high value, was erroneous.[11]

II. THE BOOTHE APPEAL.

Boothe, a holder of Soldiers' Additional Homestead Rights, filed two applications for public lands.

(1) The Carson City Claim.

The first claim, filed July 1965, designated approximately 200 acres of land near Carson City, Nevada. The Secretary refused to classify the lands for conveyance because:

"(A) The subject lands are not truly agricultural in character as they are not economically reclaimable for agricultural use;

(B) The lands are valuable for higher uses than agriculture."[12]

Section 2. The date an application was made, not the date the Secretary eventually decided to process the application, is the controlling date in determining the standards to be imposed on a particular scrip application. As these applications all predated July, 1966 (two of the three applications involved herein predated the 1964 Act itself), the Secretary was, by the terms of Section 2, expressly precluded from imposing new criteria on applicant-selected lands.

[11]We do not hold that scrip applicants are entitled to a patent on particular public lands merely by making a designation of the lands they desire. See Carl v. Udall, 309 F.2d 653 (D.C. Cir. 1962). In the ordinary case, the Secretary many deny an application for a variety of reasons, applying land use considerations, or by determining that certain parcels should be retained in federal ownership or used for some other public purpose. On these "nice issues of judgment and choice," [Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317 (1958)], the Secretary retains broad discretion, and his determinations are not subject to judicial review. See Hi-Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971). However, from this record it appears that, aside from the value of the lands, the Secretary suggested no other reason why these lands should not be conveyed to the scrip holder applicants. In fact, the Bureau of Land Management Field Examiner's reports all concluded that the lands "are suitable for transfer out of federal ownership inasmuch as they are not needed in any Bureau or other Federal programs. . . ." Thus, there appears no reason why appellants Bronken and Hall are not entitled, by reason of Section 2, to have these lands conveyed to them.

[12]The District Court declined to review the Secretary's decision on this application on the same ground relied upon in the Bronken-Hall petition, i.e., that the Secretary had acted within his discretion to classify public lands. Boothe v. Hickel, 347 F. Supp. 1273 (D. Nev. 1969). In this instance, we conclude that the decision was correct.

Boothe's attack is focused upon the Secretary's application of an agricultural suitability criterion on lands available for selection by holders of Soldiers' Additional Rights. He contends that such a limitation is contrary to the provision of the Act which created those rights and that, therefore, the Secretary's stated grounds for denying his application were invalid. We disagree.

The Act authorizing the creation of Soldiers' Additional Rights, now 43 U.S.C. §274, provides:

> "Every person entitled under the provisions of section 271 of this title to enter a homestead who may have, prior to June 22, 1874, entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

While it is true, as Boothe points out, that this statute does not expressly limit the exercise of Soldiers' Additional Rights to agricultural lands, the Department of the Interior has for many years interpreted the Section to mean that only those lands which might be entered under 43 U.S.C. §271 as an original homestead may be made the subject of an additional entry under Section 274. "The purpose of the latter Section was to enable a Civil War veteran who had already entered a homestead, but who had taken up less than 160 acres, to expand his entry up to a maximum of 160 acres on the same basis as that on which other veterans might make original homestead entries under [Section 271]." *David B. Morgan*, 60 I.D. 266, 269 (1948). This meant, in the Department's view, that only land which is "subject to entry under the homestead laws of the United States" is subject to entry by a holder of Soldiers' Additional Rights.

> "The practical construction given to an Act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons."

McLaren v. Fleischer, 256 U.S. 477, 481 (1921); *Udall v. Tallman*, 380 U.S. 1 (1965); *Webster v. Luther*, 163 U.S. 331 (1896). Boothe relies heavily on *Webster v. Luther*, in which the Su-

preme Court held that the Department could not construe the Soldiers' Additional Rights Statute to preclude assignment of the rights, as such a construction would "defeat the obvious purpose" of the Statute, 163 U.S. at 342, which was, "to give [the right] as a sort of compensation for the person's failure to get the full quota of 160 acres by his first homestead entry." 163 U.S. at 340. Although the *Webster* opinion might be read to suggest that the right is unlimited, the Court had before it only the issue of assignability of the rights, and we are not persuaded that the decision foreclosed the interpretation of the statute adopted by the Secretary on his *Morgan* decision, and consistently applied thereafter. The statute was enacted as part of an Act which created both a general homestead right for Civil War veterans and the "additional" right involved here. The Court reasoned in *Webster* that construing the right as non-assignable would render the right worthless, and that Congress could not have intended such a result. However, a construction which limits the exchange of the right to lands suitable for agriculture would not occasion such a result but, rather, would put the holder of the additional right on the same footing as those veterans who had obtained their entire 160 acre entitlement by an original homestead entry. The Department has approached the statute on these grounds, and we cannot say that its interpretation is an "unreasonable" one. *Udall v. Tallman*, 380 U.S. 1, 18 (1965). We are therefore constrained to follow the Secretary's interpretation.

Because the Secretary applied a correct legal standard to Boothe's Carson City application, and because such a standard was a part of "existing law" within the meaning of Section 2 of the 1964 Act, we are "without power" to review the Secretary's decision any further, as it is clear that he acted in an area committed by law to his discretion. See *Ferry v. Udall*, 336 F.2d 706, 711 (9th Cir. 1964), *cert. denied*, 381 U.S. 904.

(2) The Las Vegas Application.

Boothe's second application was made after July 1, 1966. Accordingly, his selection rights are governed by the provisions of Section 3 of the 1964 Act. The Secretary denied Boothe's Las Vegas application because the lands had not been previously classified as available for selection in satisfaction of Soldiers'

Additional Rights. The District Court upheld the regulation under which the Secretary had classified lands pursuant to Section 3 [43 C.F.R. §2221.07 (1967)] and dismissed Boothe's action to review the Secretary's decision. *Boothe v. Hickel*, supra.

Under Section 3, the Secretary is required to set aside, "for conveyance and exchange for each type of claim recorded under the [1955 Recording Act], public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim • • •." So long as the Secretary complied with the Act's requirements in classfying a selection pool of lands for the satisfaction of "each type" of claim, a scrip holder could acquire, under Section 3, only those lands "so classified." The sole limits Congress placed on the Secretary's discretion to classify lands for these pools were that he offer a "reasonable selection" of lands, and that the lands so classified have a value of "not less than the average fair market value . . . of those public lands actually conveyed in exchange for each type of claim since August 5, 1955."

The Secretary established his scrip selection pool, consisting of approximately three times the acreage represented by outstanding scrip claims, and, pursuant to 43 C.F.R. 2221.07(a)(1967), specified in his classification orders the types of scrip claims for which each tract would be available. Pursuant to subsections (e) and (f) of 43 C.F.R. §2221.07, the lands available for each type of claim ranged in value from a minimum amount, as provided by Section 3 of the Act, to a maximum of ten percent above this minimum.

We agree with the District Court that the Secretary's actions in carrying out the provisions of Section 3 were proper, and satisfied the statutory requirements. Boothe's attack on the value ceilings imposed by the Secretary in establishing his selection pools fails to recognize the essential difference between the Secretary's authority to handle claims under Section 2 of the Act, where the applicant could designate the lands, and under Section 3, which removed the applicant's right to initially select the particular land he desired. Under the latter section, the scrip holder could take only what was made available by the Secretary for his claim. As the Act itself required only that the lands have a specified minimum value, no scrip holder could complain

if the lands classified as suitable for exchange for his scrip exceeded this minimum. The effect of the regulation setting value ceilings on lands available for each type of claim was merely to make all the lands in a given selection pool of approximately equal value.[13] We cannot say that the Secretary's scheme of classification was inconsistent with the purposes of Section 3,[14] or that it was unreasonable. Thus, Boothe had no right under Section 3 to seek lands other than those previously classified as available to holders of Soldiers' Additional Rights. The lands he applied for were not so classified. Accordingly, the Secretary's denial of his application was correct.

The judgments in the Bronken and Hall appeals (Nos. 25,282 and 25,283) are reversed, with directions to remand the action to the Secretary of the Interior for further proceedings in conformity with this opinion.

The judgment in the Boothe appeal (No. 25,284) is affirmed.

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[13]Moreover, since under Section 6 of the Act scrip holders could accept cash rather than land for their scrip, and the amount of the cash payment was set at the average values of lands available for each type of claim, the Secretary's scheme put all claimants in an approximately equal position, whether they elected to accept lands or cash in exchange for their selection rights.

[14]The Department's plan to carry out the provisions of Section 3 in this manner was explained to the Senate committee when it considered the 1964 Act. In a statement to the committee, the Assistant Secretary said: "It is our intent, if the bill is passed in the House-passed form, to offer scrip holders land ranging in value from the average fair market value as prescribed in Section 3(a) to approximately 10 percent above that average value." Hearings on H.R. 4149, Before the Senate Subcommittee on Public Lands, Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. (Aug. 11, 1964), at 9.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO 1-11-73—480

v.

Walter J. HICKEL, Secretary of the Interior, et al., Defendants.

No. R-2048.

United States District Court,
D. Nevada.
Oct. 15, 1969.

Suit against Secretary of Interior involving land selection rights known as the soldiers' additional rights. On defendants' motion for summary judgment, the District Court, Bruce R. Thompson, J., held that regulations fixing a range of ten per cent above minimum value established by Act of August 31, 1964 as maximum value limit for lands to be classified for disposition to satisfy soldiers' additional rights were not illegal or unreasonable.

Motion granted.

1. Public Lands ⇐35(1)

Although plaintiff, who asserted land selection rights known as soldiers' additional rights, presented appealing arguments and persuasive data toward conclusion that for approximately 15 years the Secretary of the Interior had not been at all receptive to idea of patenting public lands in satisfaction of plaintiff's rights, plaintiff, whose applications under this claim of his complaint were made after July 1, 1966, was limited by law to accept lands classified by the Secretary as available to him or to accept equivalent value of money before January 1, 1975. Act August 31, 1964, §§ 1 et seq., 2, 3, 3(b), 78 Stat. 751; Taylor Grazing Act, § 1 et seq., 43 U.S.C.A. § 315 et seq.

2. Public Lands ⇐17, 97

Inherent in exercise of broad powers and manifold options granted the Secretary of the Interior by the Taylor Grazing Act and the Classification and Multiple Use Act of 1964 to classify public lands for use and disposition is a consideration of market value of lands being classified; consequently, regula-

tions dealing with value and fixing value guidelines for subordinate employees are reasonably and necessarily contemplated by laws requiring lands to be classified for disposition. Act August 31, 1964, §§ 2, 3, 3(b), 78 Stat. 751; Taylor Grazing Act, § 1 et seq., 43 U.S.C.A. § 315 et seq.

3. Public Lands ⇐97

Regulations fixing a range of ten per cent above minimum value established by Act of August 31, 1964 as maximum value limit for lands to be classified for disposition to satisfy soldiers' additional rights were not illegal or unreasonable. Act August 31, 1964, §§ 2, 3, 3(b), 78 Stat. 751; Taylor Grazing Act, § 1 et seq., 43 U.S.C.A. § 315 et seq.

4. Federal Civil Procedure ⇐2471

Averment of a conclusion of law cannot create a genuine issue of material fact precluding summary judgment.

Bradley & Drendel, Reno, Nev., and Black, Kendall, Tremaine, Boothe & Higgins, by Ferris F. Boothe, Portland, Or., for plaintiff.

Joseph L. Ward, U. S. Atty., Julien G. Sourwine, Asst. U. S. Atty., Reno, Nev., for defendants.

ORDER GRANTING SUMMARY JUDGMENT

BRUCE R. THOMPSON, District Judge.

For the reasons stated in orders this day filed in companion cases, Hall v. Hickel, D.C., 305 F.Supp 723, and Bronken v. Hickel, D.C., 305 F.Supp. 723, that is to say, because the first claim for relief in plaintiff's Complaint seeks review of agency action which has by law been committed to agency discretion, the defendants' Motion for Summary Judgment on the first claim for relief is granted.

The second claim for relief is somewhat different. The Act of August 31, 1964 (78 Stat. 751), provided:

"That, except for military bounty land warrants, all claims and holdings recorded under the Act of August 1955 (69 Stat. 534, 535) [set out as note under this section], which are not satisfied in one of the ways hereafter set forth, shall become null and void on the later of the two following dates: (a) January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975; (b) at the termination of any transaction initiated pursuant to this Act.

"Sec. 2. Prior to July 1, 1969, holders of claims recorded under the Act of August 5, 1955, may apply to the Secretary of the Interior to have conveyed to them, in satisfaction of their claims, such lands as they may in their applications, designate. The Secretary shall thereafter convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid. As used in this Act, the terms 'lands' and 'land' include any rights or interests therein.

"Sec. 3. (a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

"(b) Holders of recorded claims may apply for reasonably compact areas of land so classified, and, upon his determination that the claim upon which an application is based is valid the Secretary shall convey such lands to the applicant.

"Sec. 4. Prior to January 1, 1969, the Secretary shall, by registered

or certified mail sent to the address of record of each person having an unsatisfied claim, offer in satisfaction of such claim lands of a value of not less than the average fair market value of those public lands actually conveyed in exchange for each type of claim since August 5, 1955. Fair market value shall be determined in the manner prescribed in section 3 of this Act. Upon acceptance of the offer, the Secretary shall convey the lands to the claimant, if he determines that the claim is valid.

"Sec. 5. In respect of any type of claim recorded under the Act of August 5, 1955, not more than three conveyances of public lands in exchange for which have taken place since that date, the Secretary shall determine the type of claim which it most nearly resembles, and at least four conveyances in exchange for which has taken place since August 5, 1955, and shall, for the purposes of this Act, treat it in all respects as if it were such type of claim.

"Sec. 6. Prior to January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975, any person who has a claim recorded pursuant to the Act of August 5, 1955, by written notice to the Secretary of the Interior, or any officer of the Department of the Interior to whom authority to receive such notice may be delegated, may elect to receive cash instead of public land in satisfaction of his claim, at a rate per acre equal to the average value of the lands offered by the Secretary under section 4 of this Act. Upon a determination that the claim is valid, the Secretary or his delegate shall certify the claim to the Secretary of the Treasury who is authorized and directed to pay the claim out of any money in the Treasury not otherwise appropriated. Acceptance of the money shall constitute a full and complete satisfaction of the claim or holding for which the money is paid: Provided, That no agent or attorney acting on behalf of another to procure a payment under this Act shall demand, accept, or receive more than 10 per centum of the payment made, and any agreement to the contrary shall be null and void."

Plaintiff asserts land selection rights known as Soldiers' Additional Rights. Plaintiff alleges that the Secretary, in compliance with section 3 of the aforesaid Public Law, has classified certain public lands as available for satisfaction of such rights but that the Secretary has acted contrary to law in the following particulars, (1) the minimum fair value standards have been limited to the average of like transactions between August 5, 1955 and August 31 1964; (2) the Secretary, by regulation (43 CFR 2221.07e) has established $250 per acre as the minimum value for soldiers' additional homestead rights and $275 per acre as the maximum value; (3) the Secretary had no right to fix a maximum value; (4) plaintiff has not been provided with a "reasonable choice of public lands" against which to satisfy his claims. Plaintiff also complains of the rejection by the land office of applications filed by him for lands not among those classified by the Secretary as available for soldiers' additional rights. Section 2221.2–1 of the regulations specifically authorizes such rejection.

Inasmuch as the applications under the Second Claim of the Complaint were made after July 1, 1966, sections 2 and 3(b) of Public Law 88–545, supra, expressly authorize the rejection of applications for specific lands and support the legality of section 2221.2–1 of the regulations. Plaintiff is restricted to applying for lands which already have been classified under section 3 of the Act for this disposition.

In connection with plaintiff's complaints about the regulations fixing a maximum value of lands disposable for satisfaction of his selection rights and of the general valuation procedures of the Secretary, plaintiff presents appealing arguments and persuasive data toward the conclusion that for approximately fifteen years, the Secretary of

the Interior has not been at all receptive to the idea of patenting public lands in satisfaction of plaintiff's rights. Plaintiff's struggles to acquire lands satisfactory to him personally as a quid pro quo for his selection rights have been long, persistent and, to date, fruitless.

[1–3] Nevertheless, we believe plaintiff is limited by law to accept the lands classified by the Secretary as available to him or to accept the equivalent value in money before January 1, 1975. Inherent in the exercise of the broad powers and manifold options granted the Secretary by the Taylor Grazing Act and the Classification and Multiple Use Act of 1964 to classify public lands for use and disposition is a consideration of the market value of the lands being classified. Consequently, regulations dealing with value and fixing value guidelines for the subordinate employees are reasonably and necessarily contemplated by laws requiring lands to be classified for disposition. Accordingly, we find nothing illegal or unreasonable in the regulations fixing a range of ten per cent above the minimum value established by the Act of August 31, 1964 as the maximum value limit for lands to be classified for disposition to satisfy soldiers' additional rights. Section 3 of the Act states: "The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955." The determination of value is thus left to the Secretary and is unreviewable. The adoption by the Secretary of the date of the approval of the Act, i. e., August 31, 1964, as the cut-off date for the test transactions is one possible and reasonable interpretation of the law. In fact, the requirement that the lands involved in the base transactions from which the average fair market value is determined be valued as of the date of patent rather than the current value is an indication of Congressional intent that subsequent developments affecting value not be considered.

[4] Congress required the Secretary to classify enough lands to provide plaintiff "a reasonable choice of public lands." Plaintiff avers as a conclusion of law that the Secretary has not done so. The only facts he relies on in support of the absence of a reasonable choice relate to his complaints about the Secretary's value standards. We have found these standards to be legally acceptable. If there is any other factual issue relating to whether a "reasonable choice of public lands" has been offered, it has not been pleaded, and averment of a conclusion of law cannot create a genuine issue of material fact.

Accordingly, defendants' Motion for Summary Judgment is granted.

KEY NUMBER SYSTEM

DUGDALE PACKING COMPANY, Plaintiff,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.

Civ. No. 1580.

United States District Court, W. D. Missouri, St. Joseph Division.

Sept. 22, 1972.

Shipper brought suit against railroad for damages alleged to have resulted from spoilage of shipment of meat. The District Court, Duncan, Senior Judge, held that where shipper knew that refrigerated trailer loaded with shipment of meat could not be picked up by defendant railroad until following Monday morning and all operations with respect to loading, sealing and moving to shipper's parking lot were performed by

Dessie M. HALL, and the First National Bank of Nevada, Executors of the Estate of S. J. Hall, Deceased, Plaintiffs,

v.

Walter J. HICKEL, Secretary of the Interior; Boyd Rasmussen; Robert E. Vaughan; Robert O. Buffington; Nolan F. Keil; and Rolla E. Chandler, Defendants.

Paul B. BRONKEN, Plaintiff,

v.

Walter J. HICKEL, Secretary of the Interior; Boyd Rasmussen; Robert E. Vaughan; Robert O. Buffington; Nolan F. Keil; and Rolla E. Chandler, Defendants.

Civ. Nos. R-2115, R-2012.

United States District Court
D. Nevada.
Oct. 15, 1969.

Action against secretary of interior which had refused to classify certain lands, selected and designated by plaintiff-applicant, as being suitable for disposition in satisfaction of land selection rights known as Valentine Scrip owned by plaintiff. The District Court, Thompson, J., held that discretion exercised by Secretary was not reviewable.

Government's motion for summary judgment granted.

1. Public Lands ⇐6

Basic purpose of statute relating to satisfaction of claims arising out of scrip, lieu selection and similar rights to public lands was to bring an end to the inchoate claims against public domain and provide for an equitable method for satisfaction of land selection rights, either by conveyance of land or payment of money. Public Land Administration Act, § 1 et seq., 43 U.S.C.A. § 1391 et seq.; 43 U.S.C.A. § 1411 et seq.

2. Public Lands ⇐108

Discretion exercised by Secretary of Interior in refusing to classify certain lands, selected and designated by plaintiff-applicant, as being suitable for disposition in satisfaction of land selection rights known as "Valentine Scrip" owned by plaintiff was not reviewable by court. Act of Apr. 5, 1872, 17 Stat. 649; 5 U.S.C.A. §§ 701 et seq., 702, 703, 706.

3. Public Lands ⇐29

A nonmineral entry on withdrawn public land cannot be made and an incipient entryman acquires no enforceable rights in particular tract selected by him until that tract has been classified by Secretary of Interior as appropriate for particular kind of disposition proposed. Public Land Administration Act, § 1 et seq., 43 U.S.C.A. § 1391 et seq.

4. Administrative Law and Procedure ⇐676, 744

Federal district court is restricted to administrative record on review of administrative decision under Administrative Procedure Act and trial de novo is impermissible. 5 U.S.C.A. §§ 701 et seq., 702, 703, 706.

5. Public Lands ⇐29

Preliminary classification by Secretary of Interior is condition precedent to acquisition by a nonmineral entryman of litigable rights to a selected portion of public domain. Public Land Administration Act, § 1 et seq., 43 U.S.C.A. § 1391 et seq.

Bradley & Drendel, Reno, Nev., and Black, Kendall, Tremaine, Boothe & Higgins, Portland, Or., for plaintiffs.

Robert S. Linnell, U. S. Atty., and Julien G. Sourwine, Asst. U. S. Atty., Reno, Nev., for defendants.

ORDER GRANTING SUMMARY JUDGMENT

THOMPSON, District Judge.

These two cases, while presenting some factual differences, have one issue in common. Each plaintiff complains of the refusal of the Secretary of the Interior to classify certain lands selected and designated by plaintiff-applicant as

being suitable for disposition in satisfaction of land selection rights known as Valentine Scrip owned by plaintiff. These rights to acquire title to public lands were created by Act of Congress (Act of April 5, 1872, 17 Stat. 649).

In each case, the decision declining to permit entry on the public lands was substantially identical:

"Based upon analyses of sales of similar land located nearby, the estimate of value of the parcel far exceeds the maximum value established by regulation for land to be classified for disposal in satisfaction of Valentine Scrip. The pertinent regulation (43 CFR 2221.07(f) Circular 2210 reads: 'Hereafter, no tract of land will be classified as suitable for disposition in satisfaction for claims if the value per acre of the tract exceeds the following * * * (2) For Valentine * * * selection claims $1400.'"

Defendants moved for summary judgment, lodged the administrative record with the Court, and asserted the absence of genuine issues of fact. Since 1934, the classification of public lands for disposition has been the all-important initial step in the processing of an application to obtain a patent to public lands under the non-mineral land laws. The character of the power exercised by the Secretary of the Interior in classifying public lands for disposition thus is a fundamental consideration.

The administrative records in these cases do not amount to much. The duty of land classification imposed on the Secretary of the Interior is performed ex parte, unimpeded and unaided by the crucible of cross-examination and the contradictory evidence expected in adversary contention. Hence, at the outset, the Court is faced with the assertion that review of the administrative action cannot be limited to the administrative record and that such review will be meaningless in the absence of additional evidence, in substance, a trial de novo. During the preliminary proceedings in these cases, in order to give some background of perspective to the arguments of the opposing forces, the Court permitted affidavits from plaintiffs and required responses thereto from officers of the Government, although there has not, as yet, been a ruling upon whether review is limited to the administrative record. From the record before the Court, it appears that if a trial de novo were permitted, the plaintiffs would produce testimony and exhibits in support of the contentions (1) that plaintiffs have been deprived of property without due process of law by administrative diminishment of the value of their scrip selection rights from $5,000 per acre to $1,270 per acre; (2) that Valentine Scrip applications filed before June 30, 1966 are required by law to be processed without regard to the value of the lands selected; (3) that all applicants for lands in enforcement of scrip rights have not been treated equally, i. e., some patents have issued without regard for the value of the land selected; (4) that from June 24, 1964, for a period of two years, all scrip applications were arbitrarily delayed by express direction of the Secretary to the local land offices not to classify or approve any scrip for patent; (5) that the Secretary's offering of public lands classified for scrip describes lands "ostensibly worth $1,270 per acre" which are not worth that much; (6) that the Government's valuation of the lands selected by plaintiffs was arbitrarily and unreasonably high; and (7) that plaintiffs have never been granted a hearing or the opportunity to present evidence or cross-examine opposing witnesses and there has been a total lack of administrative due process.

The broad spectrum of the attack leveled at the Secretary has led this Court to a consideration of the character of the power exercised by the Secretary in making the decisions which, as plaintiffs would have us believe, have so woefully wronged the plaintiffs even to alleged infringements of basic constitutional rights. Obviously, if a de novo trial is granted and plaintiffs' proposed issues are litigated, the Court will not

be "reviewing" final action of an administrative agency. On the contrary, the Court will be considering and determining for the first time the issues of fact which plaintiffs wish to litigate with the United States.

In the opinion of this Court, any jurisdiction it has of the controversy rests upon the provisions of the Administrative Procedure Act of 1946 (5 U.S.C. § 701 et seq., formerly 5 U.S.C. § 1009 et seq.). Thereunder a person suffering legal wrong because of agency action is entitled to judicial review thereof (5 U.S.C. § 702) in any applicable form of action in a court of competent jurisdiction (5 U.S.C. § 703) and to have the agency action set aside upon the grounds specified in section 706. An express initial exception to the jurisdiction of the Courts to review any agency action is found in section 701, as follows: "This chapter applies, according to the provisions thereof, except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701; 4 Davis "Administrative Law Treatise", § 28.08. In the instant cases, plaintiffs, attacking the refusal of the Secretary of the Interior to classify the specific lands selected by them as available for satisfaction of Valentine Scrip, are complaining of agency action which is committed to agency discretion by law and is unreviewable in the courts.

As early as 1879, Congress vested authority in an executive agency to classify public lands with respect to their mineral character (43 U.S.C. § 31(a) 20 Stat. 394), and in 1910, with the enactment of the "Picket Act" (43 U.S.C. § 141, 36 Stat. 847), codified a previously exercised and recognized presidential power to withdraw public lands from entry and disposition under the public land laws for other "public purposes" and expressly articulated "classification of lands" as an appropriate purpose. The major impact of the concept of classification of lands by the Executive Department of the Government did not occur, however, until the passage in 1934 of the Taylor Grazing Act (43 U.S.C. § 315 et seq., 48 Stat. 1272) as amended in 1936 (49 Stat. 1976), and the first general order of withdrawal (E.O. 6910, Nov. 26, 1934; 11 CFR 1938 Ed., p. 869).[1] Section 7 of the Act (43 U.S.C. § 315f) provides:

> "The Secretary of the Interior is *hereby authorized, in his discretion,* to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, *or proper for acquisition in satisfaction* of any outstanding lien, exchange or *script* rights or land grant, and to open such lands to entry, selection, or location for disposal *in accordance with such classification* under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceed-

1. "Subject to the conditions expressed in the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497; 43 U.S.C. §§ 141-143, 16 U.S.C. § 471), it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale, or entry and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the Act of June 28, 1934 (48 Stat. 1269; 43 U.S.C. §§ 315-315n, 1171), and for conservation and development of natural resources.

"The withdrawal hereby effected is subject to existing valid rights.

"This order shall continue in full force and effect unless and until revoked by the President or act of Congress."

ing three hundred and twenty acres in area. *Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry:* Provided, That locations and entries under the mining laws including sections 181–184, 185–188, 189–192, 193, 194, 201, 202–209, 211–214, 223, 224–226, 226–2, 227–229a, 241, 251, and 261–263 of Title 30, may be made upon such withdrawn and reserved areas without regard to classifications and without restrictions or limitations by any provision of this chapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: Provided, That *upon the application of any applicant* qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, *the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right* to enter, select, or locate such lands if opened to entry as herein provided. June 28, 1939, c. 865, § 7, 48 Stat. 1272; June 26, 1936, c. 842, Title I, § 2, 49 Stat. 1976." The italicized portions are deemed to have special significance for this case.

[1] It is noted that section 7, supra, authorized classification of lands for acquisition in satisfaction of outstanding "script rights", such as the Valentine Scrip here involved. Congress has had more recent occasion to consider these rights which have been floating around as an inchoate claim against the public domain for almost a century. For example, in 1955, Congress passed a recordation statute (69 Stat. 534, quoted in note to 43 U.S.C. § 274) which, in substance outlawed scrip, lieu selection, and similar rights not recorded within the time limited. Finally, on August 31, 1964, an Act was approved "To provide for the satisfaction of claims arising out of scrip, lieu selection, and similar rights" (78 Stat. 751).[2] The basic pro-

2. "That, except for military bounty land warrants, all claims and holdings recorded under the Act of August 5, 1955 (69 Stat. 534, 535) [set out as a note under this section], which are not satisfied in one of the ways hereafter set forth, shall become null and void on the later of the two following dates: (a) January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975; (b) at the termination of any transaction initiated pursuant to this Act.

"Sec. 2. Prior to July 1, 1966, holders of claims recorded under the Act of August 5, 1955, may apply to the Secretary of the Interior to have conveyed to them, in satisfaction of their claims, such lands as they may, in their applications, designate. The Secretary shall thereafter convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid. As used in this Act, the terms 'lands' and 'land' include any rights or interests therein.

"Sec. 3. (a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

"(b) Holders of recorded claims may apply for reasonably compact areas of land so classified, and, upon his determination that the claim upon which an application is based is valid, the Secretary shall convey such lands to the applicant.

"Sec. 4. Prior to January 1, 1968, the Secretary shall, by registered mail or certified mail sent to the address of record of each person having an unsatisfied claim, offer in satisfaction of such claim lands of a value of not less than the average fair market value of those public lands actually conveyed in exchange for each type of claim since August 5, 1955. Fair market value shall be determined

pose of this law was to bring an end to these inchoate claims against the public domain and provide for an equitable method for satisfaction of the land selection rights, either by conveyance of land or payment of money.

At approximately the same time, the Congress passed the Public Land Administration Act (78 Stat. 982, 43 U.S.C. § 1391, et seq.) and the Classification and Multiple Use Act (78 Stat. 986, 43 U.S.C. § 1411 et seq.), which contemplate a thorough revision of the public land laws and, in the interim, increase authority in the Secretary regarding classification and disposition of public lands. Congress suggested the following considerations to influence the Secretary in his classification of lands:

"* * * (1) required for the orderly growth and development of a community or (2) are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development or (b) retained, at least during this period, in Federal ownership and managed for (1) domestic livestock grazing, (2) fish and wildlife development and utilization, (3) industrial development, (4) mineral production, (5) occupancy, (6) outdoor recreation, (7) timber production, (8) watershed protection, (9) wilderness preservation, or (10) preservation of public values that would be lost if the land passed from Federal ownership." 43 U.S.C. § 1411.

Even before the Classification and Multiple Use Act of 1964, the Secretary had broad discretion in the classification of public lands. As a partial list of the options open: A Taylor Grazing Act Section 8 exchange (43 U.S.C. § 315g) "when public interests will be benefited thereby"; a public sale in his discretion (43 U.S.C. § 1171); a lease or sale as a small tract "in his discretion" (43 U.S.C. § 682a); a lease or sale for recreation or other public purposes "in the exercise of his discretion" (43 U.S.C. § 869).

[2] All the foregoing is, of course, preamble to a consideration of whether the Secretary's authority to classify lands prior to entry and disposition represents agency action committed to agency discretion by law which the courts may not review. The difficulties inherent in this inquiry are spelled out in Volume 4 of Davis' "Administrative Law Treatise" in his discussion of unre-

in the manner prescribed in section 3 of this Act. Upon acceptance of the offer, the Secretary shall convey the lands to the claimant, if he determines that the claim is valid.

"Sec. 5. In respect of any type of claim recorded under the Act of August 5, 1955, not more than three conveyances of public lands in exchange for which have taken place since that date, the Secretary shall determine the type of claim which it most nearly resembles, and at least four conveyances in exchange for which has taken place since August 5, 1955, and shall, for the purposes of this Act, treat it in all respects as if it were such type of claim.

"Sec. 6. Prior to January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975, any person who has a claim recorded pursuant to the Act of August 5, 1955, by written notice to the Secretary of the Interior, or any officer of the Department of the Interior to whom authority to receive such notice may be delegated, may elect to receive cash instead of public land in satisfaction of his claim, at a rate per acre equal to the average value of the lands offered by the Secretary under section 4 of this Act. Upon a determination that the claim is valid, the Secretary or his delegate shall certify the claim to the Secretary of the Treasury who is authorized and directed to pay the claim out of any money in the Treasury not otherwise appropriated. Acceptance of the money shall constitute a full and complete satisfaction of the claim or holding for which the money is paid: Provided, That no agent or attorney acting on behalf of another to procure a payment under this Act shall demand, accept, or receive more than 10 per centum of the payment made, and any agreement to the contrary shall be null and void."

viewable action. No single test is available to distinguish between agency action which is reviewable or which is non-reviewable or to determine the scope of review. It is possible to summarize the principal factors and case authorities which are persuasive to the conclusion that the discretion exercised by the Secretary of the Interior in these cases in classifying the lands selected by plaintiffs as unavailable for satisfaction of their Valentine Scrip rights is not reviewable.

Probably the most direct precedent is Ferry v. Udall, 9th Cir. 1964, 336 F.2d 706, a decision praised by Professor Davis in his supplement to Chapter 28 of his treatise. There the Court clearly distinguished between agency action which merely "involves discretion" and agency action "committed to agency discretion", and concluded that the Secretary's decision not to accept any offer for purchase of public lands offered for sale under the Isolated Tracts Act was unreviewable. This was because "Under this Act, Congress has left entirely to the Secretary's discretion whether to dispose of the land or not." The statute did not make it "mandatory for the Secretary to transfer the land to those who complied with the statutory requirements." Cf. United States ex rel. McLennan v. Wilbur, 1931, 283 U.S. 414, 51 S.Ct. 502, 75 L.Ed. 1148.

A more ancient precedent in this Court is Sellas v. Kirk, 9th Cir. 1953, 200 F.2d 217, affirming 101 F.Supp. in which both the district court and court of appeals held that a rule est lished by the Secretary concern classification of base properties betw control of water and ownership of l under the Taylor Grazing Act w agency action committed by law agency discretion and unreviewable.

This year, in Hopkins v. Uni States, 9th Cir. 1969, 414 F.2d 464, Ninth Circuit expressly recognized pervasive effect of the Taylor Graz Act, which "changed existing law conditioning entry and settlement u the Secretary's prior classification of lands as suitable."[3]

Similarly, in Carl v. Udall, 1962, U.S.App.D.C. 33, 309 F.2d 653, in viewing the rejection by the Secreta of an application for public lands satisfy lieu selection rights granted Congress, which are similar to Valenti Scrip rights, the Court held that t rights were not to the particular lan selected by the applicant and that t Secretary had the discretion to defe the entry of the particular lands selecte by classifying them as "lands which the public interest should be retained public ownership." (This was under t Taylor Grazing Act and before passa of the Classification and Multiple U Act of 1964 which expressly acknow edges such broad powers in the Secr tary.)

3. Hopkins v. United States and Finch v. United States, 10th Cir. 1967, 387 F.2d 13, are not apposite on the question of the reviewability of the Secretary's classification. Both cases involved Indian homestead applications under the General Allotment Act which expressly provides for Court action to enforce the right to an allotment (25 U.S.C. § 345). That is to say, the Court was not reviewing final agency action by authority of the Administrative Procedure Act with its provision excepting agency action committed to agency discretion by law. The *Hopkins* opinion expressly recognized the distinction:

> "25 U.S.C. § 345 and 28 U.S.C. § 1353 give district courts original jurisdiction of actions involving the right to an allotment under the General Allotment Act. Pomfybitty v. Shelly Oil Co., 390 U.S. 365, 368 n. 5, [88 S.Ct. 982, 19 L.Ed.2d 1239] (1968); Arenas v. United States, 322 U.S. 419, 429–430 [64 S.Ct. 1090, 88 L.Ed. 1363] (1944); United States v. Payne, 264 U.S. 446 [44 S.Ct. 352, 68 L.Ed. 782] (1924); Wise v. United States, 297 F.2d 822, 823 (10th Cir. 1951). Plaintiffs' contention that the Secretary exceeded the powers conferred upon him by the governing statutes is subject to judicial review in such a suit. Arenas v. United States, supra, [322 U.S.] at 432, 64 S.Ct. 100. Wise v. United States, supra, 297 F.2d at 823."

While not relying expressly upon the unreviewability of agency action committed by law to agency discretion, the Ninth Circuit assumed it sub silentio in Pease v. Udall, 9th Cir. 1964, 332 F.2d 62, saying: "The initial difficulty with appellant's position—*and which we find dispositive*—(emphasis added) is that the Mineral Leasing Act has consistently been construed as leaving to the Secretary, within his discretion, a determination as to what lands are to be leased thereunder. Haley v. Seaton, 1960 [108 U.S.App.D.C. 257], 281 F.2d 620, 623–626."

The exact problem before us has been considered by the District of Oregon in Linn Land Company v. Udall, 1966, D.C., 255 F.Supp. 382, and Shaw v. Udall, 1967, D.C., 264 F.Supp. 390. Both cases involved an effort to review the Secretary's refusal to classify lands as available for entry in satisfaction of scrip rights. In the *Linn Land Company* case, Judge Kilkenny said: "I have grave doubts as to the court's jurisdiction to review the power of the Secretary to classify the lands pursuant to the legislation and the Executive Order." This concern was reiterated in the Shaw opinion.[4]

Hamel v. Nelson, N.D.Cal.1963, 226 F.Supp. 96, is a case in which Judge MacBride forthrightly denied judicial review of the Secretary's refusal to issue a patent under 43 U.S.C. § 1068 because he had discretion to do so or not, a discretion which had been committed to him by law.

So much for the primary public lands decisions in this area. Reviewing them and the applicable statutes, with recent amendments and additions which have broadened the Secretary's powers in the field of classification of public lands, I am impressed with the relevancy of the reasoning of the Supreme Court in Panama Canal Co. v. Grace Line, Inc., 1958, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed. 2d 788, in which the Court said:

> "Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009, excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.' We think the intitiation of a proceeding for readjustment of the to tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co. Petitioner is, as we have seen, an agent or spokesman of the President in these matters. It is 'authorized' to prescribe tolls and to change them. Canal Zone Code, Tit. 2, § 411. But the exercise of that authority is far more than the performance of a ministerial act. As we have seen, the present conflict rages over questions that at heart involve problems of statutory construction and cost accounting: whether an

[4] "Defendant takes the position that the classification for disposal of parcels of the public domain, for which plaintiff made application, is a matter committed by law to agency discretion, and thus, exempted from judicial review. Moreover, the Secretary argues that this action is, in fact, against the United States and since the Government has not consented to be sued, the action should be dismissed for want of an indispensable party. The precise jurisdictional issue on the right of this Court to review the decision of the Secretary was before me in Linn Land Co. v. Udall, 255 F.Supp. 382 (D.Or.1966), in which I expressed grave doubts as to the Court's jurisdiction to review the action of the Secretary in classifying the lands. I remain of the same belief. The Ninth Circuit decisions in Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959) and Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), cited by plaintiff, relate to mining claims. Such cases involve property rights 'in the fullest sense' in specific property, rather than the 'floating' scrip rights of plaintiff. More closely in point are Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Thor-Westcliffe Development, Inc. v. Udall, 114 U.S.App.D.C. 252, 314 F.2d 257 (1963); and Haley v. Seaton, 108 U.S.App.D.C. 257, 281 F.2d 620 (1960). Although these cases grew out of the Mineral Leasing Act, the Secretary's discretionary powers are almost identical with those he possesses under the Taylor Grazing Act."

operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice, State of New York v. United States, 331 U.S. 284, 335, [67 S.Ct 1207, 1234, 91 L.Ed. 1492], which require the exercise of informed discretion. Cf. United States ex rel. McLennan v. Wilbur, 283 U.S. 414 [51 S.Ct. 502, 75 L.Ed. 1148]; Interstate Commerce Commission v. United States of America ex rel. Humboldt S. S. Co., 224 U.S. 474, 484–485 [32 S.Ct. 556, 559, 56 L.Ed. 849]. The case is, therefore, quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action. Cf. Virginian R. Co. v. System Federation, 300 U.S. 515, 551 [57 S.Ct. 592, 601, 81 L.Ed. 789]; Kansas City So. R. Co. v. Interstate Commerce Commission, 252 U.S. 178 [40 S.Ct. 187, 64 L.Ed. 517]. We put the matter that way since the relief sought in this action is to compel petitioner to fix new tolls. The principle at stake is no different than if mandamus were sought—a remedy long restricted, Maybury v. Madison, 1 Cranch 137, 166 [2 L.Ed. 60]; Decatur v. Paulding, 14 Pet. 497, 514–517 [10 L.Ed. 559], in the main, to situations where ministerial duties of a nondiscretionary nature are involved. Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available. Harmon v. Brucker, 355 U.S. 579 [78 S.Ct. 433, 2 L.Ed.2d 503], is a recent example. There the Secretary of the Army issued less than 'honorable' discharges to soldiers, based on their activities prior to induction. The Court held that the 'records,' prescribed by Congress as the basis for his action, were only records of military service. But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a discretionary and profound exercise of discretion. See Work v. United States ex rel. Rives, 267 U.S. 175, 183 [45 S.Ct. 252, 254, 69 L.Ed. 561]; Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 [50 S.Ct. 320, 324, 74 L.Ed. 809]; United States ex rel. Chicago Great Western R. Co. v. Interstate Commerce Commission, 294 U.S. 50, 62–63 [55 S. Ct. 326, 331, 79 L.Ed. 752]. We think must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

"We think this case is in that area. The petitioner, as agent of the President, is given questions of judgment requiring close analysis and nice choices. Petitioner is not only agent for the President but a creature of Congress. It is on close terms with its committees, reporting to the Congress, airing its problems before them, looking to Congress for guidance and direction. It is at least arguable that Congress to date has sided with petitioner and against the Comptroller General in construing §§ 411 and 412 of the Code. For Congress, fully advised of the Comptroller General's views, in his Report for 1954, approved the budgets for the Panama Canal Co. for 1956, 1957, and 1958, based on petitioner's interpretation of the statute and its methods of accounting and cost allocation, 69 Stat. 235–237, 71 Stat. 322–324, 71 Stat. 78. That does not necessarily mean that the construction of the Act, pressed on us and on Congress by petitioner, is the correct one. It does, however, indicate that the question is so wide open and of such large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for courts to intrude."

[3] In the classification of lands, the exercise of the authority granted by Congress is far more than the perfor-

ance of a ministerial act. It is a matter on which experts may disagree involving nice issues of judgment and choice which requires the exercise of an informed discretion. True, there are two statutes which impose a duty to act on the Secretary, first, the Taylor Grazing Act ("* * * upon the application of any applicant * * * the Secretary of Interior shall cause any tract to be classified * * *" 43 U.S.C. § 315f) and the Act of August 31, 1964 (78 Stat. 751) ("* * * the Secretary shall classify for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955 public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice * *."). Performance of these statutory duties to classify may, of course, be compelled by the courts. Udall v. Taunah, 10th Cir. 1968, 398 F.2d 795; Richardson v. Udall, D.C.Ida.1966, 253 F. Supp. 72. And if this were all that is involved, we might view the Panama Canal Co. case as authorizing judicial review. But Ferry v. Udall, *supra*, teaches that this is not so, as does Lewis v. Udall, 9th Cir. 1967, 374 F.2d 180. Both cases involved applications under 43 U.S.C. § 1171. Such applications may be, and frequently are, initiated by the proposed entryman, who, by his application, brings into operation the mandatory requirement of the Taylor Grazing Act that the Secretary "shall cause any tract to be classified." 43 CFR 2243.0–1, et seq., the regulations as of January 1, 1969, which are not materially different from preceding regulations. So, it is not the duty to classify which is important here. It is the broad administrative discretion to classify or not to classify for a particular purpose or particular kind of disposition. The judiciary simply cannot supervise the considerations of public benefit, value, multiple use and private advantage which are inherent in the broad choices Congress has made available to the Secretary. Since the Taylor Grazing Act and the President's withdrawal Orders of the early 1930's, Congressional policy has been clear. A non-mineral entry on withdrawn lands cannot be made and an incipient entryman acquires no enforceable rights in a particular tract selected by him until that tract has been classified by the Secretary as appropriate for the particular kind of disposition proposed. Hopkins v. United States, *supra*.

Another factor which reinforces our conclusion that the Secretary's classification action is not reviewable is the state of the record which is sought to be reviewed. Since the initial regulations promulgated after enactment of the Taylor Grazing Act (43 C.F.R., First Edition, 296.7), the classification of lands has been interpreted by the Secretary to be discretionary action taken in a non-advisory proceeding. Accordingly, current regulations (43 CFR 2411.1–1, et seq., revised as of January 1, 1969) and their predecessors provided only for protests of the initial classfication decision and administrative review thereof, supervisory in character, in ex parte non-adversary proceedings. Such a protest is to be distinguished from a contest proceeding in the land office (43 CFR 1852.1, et seq.) where pleadings are filed, evidentiary hearings held, adversary in character, and formal appeals allowed through the administrative heirarchy to the Secretary himself. While it may be possible to point to anachronistic examples in the regulations, generally speaking the contest procedure in the land office regulations has governed disputes in which enforceable private rights to the use, occupancy or title to public lands are asserted as against the Government under the public land laws (Cf. Stewart v. Penny, 1965, D.C., 238 F.Supp. 821) or against competing private claimants to the same lands. By contrast, the protest procedure in the land office regulations has applied to situations where the adjudication of specific rights is not involved, but the supplication is directed to the discretion of the Secretary and his subordinates. Accordingly, where provision for protest is made, no formal pleadings are required, an adversary hearing is not contemplated and the so-called "appeal"

invokes the supervisory authority of the Secretary over the discretionary acts of his subordinates and not the review of a formal record.

[4, 5] This situation is persuasive against judicial review of a classification action because it is indicative of the Secretary's interpretation of the laws that in classifying lands, he is exercising a discretion which has been committed to him by law. In addition, it leaves us with nothing to review, that is to say, there is nothing before the Court to support an informed judgment as to whether the standards of proper administrative action have been met as prescribed in the Administrative Procedure Act (5 U.S.C. § 706). Inasmuch as the only basis for review of the decisions adverse to these plaintiffs is under the Administrative Procedure Act, we are confronted with the principle that the Court is restricted to the administrative record. A trial de novo is impermissible. Dredge Corporation v. Penny, 9th Cir. 1964, 338 F.2d 456; Adams v. United States, 9th Cir. 1963, 318 F.2d 861. The only escape from this dilemma, as I see it, is to conclude that the protest procedure prescribed by the regulations is unconstitutional and violates due process of law and that a more formal and adversary contest procedure is required in processing a petition for classification of lands. Such a conclusion would necessarily be predicated upon the concept that an application for entry on the public lands and the accompanying petition for classification preliminary to allowance of entry vests in the applicant a litigable right to the specific lands selected by him. This is not only contrary to the specific holding of Carl v. Udall, *supra*, which is highly persuasive in its reasoning, but is also entirely inconsistent with the development of the public land laws in the twentieth century, commencing with the Picket Act of 1910 through the Taylor Grazing Act of 1934, to the Classification and Multiple Use of Act of 1964. Congressional intent obviously requires preliminary classification by the Secretary as a condition precedent to the acquisition by a non-mineral entryman of li
ble rights to a selected portion o
public domain. Cf. Dredge Corpor
v. Penny, 9th Cir. 1966, 362 F.2d 8

Accordingly, the Government's M
for Summary Judgment is granted.

UNITED STATES DEPARTMENT OF
THE INTERIOR
BUREAU OF LAND MANAGEMENT

Nevada State Office
Post Office Box Number 1551
Reno, Nevada 89505

February 3, 1966

CLASSIFICATION DECISION

The following described lands are not proper for selection for Soldiers' Additional Homestead Scrip:

Mount Diablo Meridian, Nevada
T. 15 N., R. 20 E.,
Sec. 28, SW¼NE¼, NW¼SE¼, E½SW¼NE¼SW¼, SE¼NW¼NE¼SW¼, W½W½NE¼NE¼, NW¼NW¼SE¼NE¼, W½E½SE¼;
Sec. 33, W½E½NE¼.

Total — 200 acres

Reasons in support of denial are:

1. The subject lands are not truly agricultural in character as they are not economically reclaimable for agricultural use.
2. The lands are more valuable for higher uses than agriculture. The W½W½NE¼NE¼, NW¼NW¼SE¼NE¼, W½NE¼SE¼ and NW¼SE¼SE¼ sec. 28 are valuable for retention in public ownership as "open space" reserve. The re-

maining lands are valuable for residential development in the near future.

The following petitions are hereby denied:

Ferris F. Boothe	Nevada 066219
Ferris F. Boothe	Nevada 066220
Ferris F. Boothe	Nevada 066221

Nolan F. Keil
NOLAN F. KEIL
State Director, Nevada

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1623

FERRIS F. BOOTHE, PETITIONER

v.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 29-32) is reported at 347 F.Supp. 1273. The opinion of the court of appeals (Pet. App. 17-28) is reported at 473 F. 2d 790.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1973. A timely petition for rehearing was denied on March 29, 1973. The petition for a writ of certiorari was filed on June 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below properly deferred to a long-standing administrative determination of the Secre-

tary of the Interior restricting selections by holders of soldiers' additional rights to lands similar to those subject to entry under the original homestead laws, namely, to agricultural lands.

2. Whether the courts below properly held that the Secretary did not exceed his discretionary power under recent legislation by setting a ceiling on the value of land available for selection.

STATEMENT

Petitioner, as a holder of soldiers' additional homestead rights (issued under the Act of June 1872, 17 Stat. 333, as amended, 43 U.S.C. 274), filed two applications for public lands. The first application, filed on about July 22, 1965,[1] was for 200 acres near Carson City, Nevada. The Bureau of Land Management denied entry on the ground that the lands selected were "not truly agricultural in character" and were "valuable for higher uses than agriculture." Petitioner's second application, made after July 1, 1966, was for 124.70 acres located outside of Las Vegas, Nevada. It was rejected on the ground that the lands sought exceeded in value the maximum established for selection lands by departmental regulation, promulgated under Section 3 of the Act of August 31, 1964, 78 Stat. 751, 43 U.S.C. 274 (note).

Petitioner brought suit to compel the Secretary to convey to him the specific parcels he had selected in satisfaction of his soldiers' additional rights. The district court denied relief and the court of appeals affirmed.[2]

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[1]The dates are significant because, under the 1964 statute cited below, the Secretary's discretion has been held to be greater with respect to applications filed after July 1, 1966, than with respect to those submitted before that date.

[2]The court of appeals reversed the judgment in a companion case, consolidated on appeal, which involved different claimants (Bronken and Hall) who had applied for lands before July 1, 1966. Since the government has not sought review of that ruling, it does not concern us here.

ARGUMENT

The opinion of the court of appeals fully and clearly sets out the history of the land selection system, the various statutes and regulations involved, and the controlling decisions. It would be wasteful to duplicate that effort here and we accordingly rely on the appellate court's excellent opinion. We shall confine ourselves to a very brief statement of the governing considerations which, in our view, compel the result reached below.

1. The issue with respect to the Carson City lands is simply whether the Secretary of the Interior reasonably restricted holders of "soldiers' additional rights" to selecting agricultural lands, like other homesteaders. The answer seems to us very plain, in light of the policy and language of the statute (43 U.S.C. 274), which merely allowed Civil War veterans who selected a homestead of less than 160 acres to enter additional acreage to make up that maximum. Since the original homestead selection has long been limited to agricultural lands, it is natural to read the same limitation as impliedly imposed on the additional selection. At the very least, that construction is not so clearly erroneous as to warrant overturning the Secretary's long-standing rule.

2. The application for public land near Las Vegas presents a different question because it was filed after a new statutory scheme had become effective. With respect to such applications (submitted after July 1, 1966), Congress expressly authorized the Secretary of the Interior to further restrict the lands which would be subject to entry by outstanding scrip holders, provided only (1) he made enough acreage available to afford each applicant a reasonable choice and (2) such lands were not less valuable than those granted to home-

steaders of the previous decade. See 43 U.S.C. 274 (note). There is no claim that the Secretary violated either mandate; the complaint is simply that his regulation also prevented disposition of abnormally valuable public lands to scrip holders. This imposition of a maximum value ceiling, it seems to us plain, in no way violated the statute. On the contrary, we submit the rule was entirely reasonable, designed as it was to insure fair treatment of all claimants and lessen profiteering.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

AUGUST 1973.

DOJ-1973-08